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No. 95-1329

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

MR. AND MRS. CONRAD MOCK,

Petitioners,

v.

DEPARTMENT OF ENVIRONMENTAL RESOURCES,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

BRIEF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS AS AMICUS CURIAE IN SUPPORT OF THE PETITIONERS

Joan T. Ochoa
National Association of
Home Builders
1201 15th Street, N.W.
Washington, D.C. 20005
(202) 822-0291

Of Counsel

Mary V. DiCrescenzo*
National Association of
Home Builders
1201 15th Street, N.W.
Washington, D.C. 20005
(202) 822-0291

**Counsel of Record*

18 pp

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MOTION OF THE NATIONAL ASSOCIATION OF HOME BUILDERS FOR LEAVE TO FILE THE ATTACHED BRIEF *AMICUS CURIAE*

The National Association of Home Builders ("NAHB") respectfully moves this Court for leave to file the attached brief *amicus curiae* in support of Petitioner.

The NAHB has received the Petitioner's written consent to file this brief as *amicus curiae* in support of the Petitioner and has filed the letter of consent with the Clerk of this Court. The Respondent has declined our request for consent to file a brief in support of the petition.

The NAHB represents 185,000 builder and associate members organized in approximately 850 affiliated state and local associations in all fifty states, the District of Columbia, and Puerto Rico. NAHB's members include not only people and firms that construct and supply single-family homes, but also apartment, condominium, commercial and industrial builders, land developers and remodelers. It is the voice of the American shelter industry.

The Just Compensation Clause of the Fifth Amendment serves as a vital shield against oppressive governmental land use regulation. It is of paramount importance to this *amicus* and its members. The actual, as opposed to merely theoretical, availability of an appropriate constitutional remedy for government action that results in a taking of private property is critical to landowners who either (1) have lost all reasonable economic use of their property solely in order to serve broader public (*i.e.*, governmental) interests, or (2) are faced with overreaching governmental requirements that fail to substantially advance legitimate governmental interests. The former type of governmental imposition is presented in this case by the Department of Environmental Resource's (DER) denial of a fill permit for less than one acre of the wetlands situated on the Petitioners' property. Without such a permit, the Petitioners have been unable to make any economically viable use of their property.

The NAHB has been before the Court as an *amicus curiae* or as "of counsel" to property owners in a number of cases involving the rights of landowners to use their property and the remedy to be applied when those rights are interfered with. These include *Agins v. City of Tiburon*, 447 U.S. 255 (1980), *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981), *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987);[1] *First English Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987); and *Dolan v. City of Tigard*, ____ U.S. ____, 114 S.Ct. 2309 (1994). The NAHB submits the attached brief to the Court to clarify the rules that must be applied in cases where a property owner has been denied economically viable use of his or her land.

This *amicus* believes that the accompanying brief will assist the Court because its concerns are much broader than those of petitioners. The NAHB's members are faced with countless regulatory decisions on a daily basis across the nation that affect the use of privately held land and the ability to provide society with

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[1] The Court's opinion cited the NAHB's brief, 483 U.S. at 840.

necessary and affordable shelter. The vast majority of these decisions come from local governments and, as pointed out in the accompanying brief, some of these decisions do not respect the constitutionally protected property rights of individuals. While the petitioners focus their argument on the harm DER has inflicted on them, our brief addresses the broader mandates of takings law that should be applied when government decisions abuse private rights and cites authorities different from those in Petitioner's brief.

For the above reasons, this Motion should be granted.

Respectfully submitted,

/s/ Mary V. DiCrescenzo

MARY V. DICRESCENZO
National Association of Home Builders
1201 15th Street, N.W.
Washington, D.C. 20005
(202) 822-0291

Counsel for *Amicus*

April 22, 1996

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BRIEF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS AS AMICUS CURIAE IN SUPPORT OF THE PETITIONERS

INTEREST OF THE AMICUS CURIAE

The interest of the *amicus curiae* is set forth in the accompanying motion for leave to file this brief.

SUMMARY OF THE REASONS FOR GRANTING THE WRIT

The Just Compensation Clause of the Fifth Amendment, and its implementation as a shield against oppressive governmental land use regulation, is of paramount importance to the members of the National Association of Home Builders. Our members are constantly involved in the purchase, sale, improvement, and use of vast amounts of privately-held land in the United States. The Constitutional guarantee of compensation for the governmental action or regulation that results in a taking is critical to landowners who have been denied all economically

viable use of their property so that their property may be used to serve broad public or governmental interests. This case presents an example of precisely this type of governmental imposition. Here, as determined by the Pennsylvania Environmental Hearing Board (Board), the Department of Environmental Resource's (DER) denial of the Petitioners' permit application resulted in the loss of all economically viable use of the Petitioners' property. The end result is a *de facto* conversion of private property into a public wetland preserve, without the payment of Just Compensation. While the preservation of wetlands is a legitimate public goal, the Fifth and Fourteenth Amendments of the United States Constitution require that the public pay for the value of land that is preserved in its natural state on behalf of the public, rather than forcing the individual landowner to bear the public burden alone.[2]

The Board, the Pennsylvania Commonwealth Court ("Commonwealth Court"), and the Pennsylvania Supreme Court ("Pa. Supreme Court") misapplied important precepts of law in denying the Petitioners' takings claim. While the Board and the Commonwealth Court acknowledged that the denial of the Petitioners' permit application rendered the Petitioners' land valueless, both tribunals ignored the Constitutional implications of such a determination by failing to find that a taking occurred thereby necessitating the payment of just compensation, as required by the Fifth Amendment. Instead, the Board, the Commonwealth Court, and the Pa. Supreme Court are under the illusion that, contrary to the unrebutted evidence presented at the hearing, some other undefined use might be made of the property, and placed on the Petitioners the untenable burden of attempting to find that illusory use. In essence, the Board and both Pennsylvania courts are requiring that the petitioners prove a negative — an impossible task — in order to establish their takings claim.

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[2] *Andrus v. Allard*, 444 U.S. 51, 65 (1979). *See also, Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922) ("[T]he question at bottom is upon whom the loss . . . should fall.")

The case should never have reached this stage. The findings of the Board were clear: without the permit, the land is essentially valueless. The Commonwealth Court acknowledged this simple fact; therefore, its only task should have been to follow this Court's precepts in *Lucas v. South Carolina Coastal Council*.[3] Specifically, once a finding has been made that a governmental action has left a property owner with no economically viable use for his or her property, a reviewing court should simply determine the amount of compensation owed the landowner. Furthermore, once a property owner establishes a prima facie case for a categorical taking, as the Petitioners did here, the burden of production must shift to the government to demonstrate that reasonable, economically feasible alternatives to the owner's proposed use are available. If the government agency cannot satisfy the reviewing court that such uses exist, compensation must be awarded.

Protecting the environment is an important goal in maintaining society's quality of life. Nevertheless, government must recognize and respect property rights. Anything short of that proper respect, as occurred here, is repugnant to the more fundamental concepts of due process of law expressed in the Constitution. The petitioner's current situation is one that is, unfortunately, familiar to property owners across the country. Therefore, it is essential that this Court issue a writ of certiorari so that it will have the opportunity to clarify for the lower courts the rules that must be applied when it is determined that a categorical taking has occurred.

REASONS FOR GRANTING THE WRIT

I. Law and Logic Require that the Burden of Production Shift to the Government When a Property Owner Establishes a Categorical Taking Resulting From a Government Action

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[3] 505 U.S. 1003, 112 S.Ct. 2886 (1992).

that Denies the Owner Economically Viable Use of His or Her Property

A requirement that the Petitioners prove a negative! This is the impossibility that was imposed on the Petitioners by the Board and the Pennsylvania courts. It is the essence of this case.

Similar to countless individuals across the country, the Petitioners purchased land as a long-term investment. When it came time to develop their property, the Petitioners, like so many other landowners, learned that new regulations were in place restricting development. In the case of the Petitioners, the regulations were designed to protect wetlands. In order to develop their land, the Petitioners needed a fill permit from the DER that would allow them to fill less than one acre of the wetlands that are located on their property. The DER's denial of the permit prevented them from constructing the proposed automotive repair facility and left the Petitioners with no economically viable use of their property.[4]

The refusal of the Board and the Pennsylvania courts to find a taking in this case is based upon the erroneous and unsupported conclusion that some use other than the Petitioners' proposed automobile repair shop could be made of the property. This conclusion was reached irrespective of the unrebutted evidence presented at the hearing and after acknowledgment of the fact that without the requested permit, the Petitioners' land was essentially valueless. As noted in the petition for a writ of *certiorari*, the Board made the following specific finding:

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[4] In *Lucas* this Court outlined two types of regulatory actions that are to be considered a categorical taking. The first type encompasses those regulations that " . . . compel the property owner to suffer a physical 'invasion' of his property . . . " The second type of action is where a regulation denies all economically beneficial or productive use of land. *Lucas*, 505 U.S. 1003, 1015, 112 S.Ct. 2886, 2893.

> The Site in its present condition and without a permit to fill in a portion of the wetlands is essentially valueless. With a permit similar to that applied for by Appellants, the Site could have a value of $175,000 . . . or more.

Despite this explicit finding, the Board denied the Petitioners' takings claim on the irreconcilable premise that there could be "some other" use made of the property. This error was then repeated by the Commonwealth Court:

> Therefore, although we accept the board's finding that the land in its present state is essentially valueless, the Mocks failed to prove that their land lost all of its residual value when the department denied their fill permit.[5]

The Commonwealth Court then compounded its error by suggesting alternative uses for the site without any regard for their economic feasibility or suitability of the land for the suggested uses.[6] The Court should never have taken this leap into speculative land development. The Petitioners had already established a prima facie case for a categorical taking: when the permit that would allow them to build an automobile repair shop was denied, they lost all economically viable use of their land. Any production of evidence for an alternative development was, at that point, the responsibility of the DER.

The shifting of the burden of production to the government once a prima facie categorical takings case has been established is supported by case law and logic. Requiring a property owner to search out and demonstrate the impossibility of use after use and thereby once again prove a total absence of value "would make

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[5] *Mock v. Dept. of Environmental Resources*, 154 Pa.Cmwlth. 380, 396, 623 A.2d 940, 949 (1993).

[6] Specifically, the court suggested:

. . . museums, libraries, hospitals, nursing homes, medical and other office buildings, recreational and municipal facilities, service and reatil shops, and restaurants. *Mock*, 154 Pa.Cmwlth. at 392, 623 A.2d at 947.

an illusion out of the fifth amendment. Instead, plaintiff's initial burden is to produce sufficient evidence of the absence of real value to shift the burden to defendant."[7] Indeed, as the Court of Federal Claims noted, "[c]ommon sense, however, indicates the impossibility of requiring the [property owner] to prove a negative."[8] Instead, the landowner must produce sufficient evidence (i.e., a prima facie case) that it is more likely than not that there remains no economically viable use for the property. Once the burden shifts, the government must then rebut the showing or the property owner prevails.

The government cannot meet this burden by merely reciting the uses listed for a given parcel of land in the local zoning code. While a variety of uses for a particular site may be permitted by the zoning code, those uses are often not feasible. To meet its burden of production, the government must establish available uses for the property that are physically feasible and economically viable. Also, there must be "a demand for such use in the reasonably near future."[9]

The shifting of the burden of production to the government in cases of categorical takings is both reasonable and logical. Requiring a landowner, after the landowner has established that his or her property is rendered valueless as a result of government action, to demonstrate that an endless stream of alternative uses are inappropriate for the site and, oftentimes, will result in rejection by the government for reasons similar to the rejection of the original application, is absurd. Common sense

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[7] *Florida Rock Industries, Inc. v. U.S.*, 21 Cl.Ct. 161, 170 (1990).

[8] *Loveladies Harbor, Inc. v. U.S.*, 21 Cl.Ct. 153, 157-8 (1990). *See also, Bowles, v. U.S.* ("It would be patently unreasonable, and logically impossible, to require plaintiff to prove a negative — that [the property] has no value. In this case the court finds that plaintiff has produced sufficient evidence to establish a prima facie case and shift the burden of production to defendant."), 31 Fed. Cl. 37, 45 (1994).

[9] *Loveladies Harbor*, 21 Cl. Ct. at 158 (quoting *United States v. 341.45 Acres of Land*, 633 F.2d 108, 111 (8th Cir. 1980), *cert. denied sub nom.* See also *Olson v. U.S.*, 292 U.S. 246 (1934).

demands that the burden of production shift to the government in these circumstances.[10]

II. The Denial of a Permit Left the Petitioners With No Economically Beneficial or Productive Use of Their Land and Thus Constituted A Categorical Taking Requiring the Payment of Just Compensation

The Pennsylvania courts' reviews of the takings issue were limited to whether the Board's findings were supported by substantial evidence and whether the Board, in reaching its decision, committed any errors of law. Both courts found that the Board's findings were supported by substantial evidence and that no errors of law were made. However, these conclusions were simply wrong as the Board failed to recognize that a constitutional violation had occurred as a result of the DER's denial of the Petitioners' application for a fill permit. This violation continues today due to the Pennsylvania courts' misapplication of this Court's decision in *Lucas v. South Carolina Coastal Council*.[11]

Lucas reiterated the long-standing principle of law that a taking occurs if a governmental regulation or action denies a property owner economically viable use of his or her property.[12] Those governmental actions that fall into this category and leave

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[10] As Petitioners state in their petition for certiorari, requiring the government to meet this burden of production is no different than the precepts established by this Court in *Dolan v. City of Tigard*, ____ U.S. ____, 114 S.Ct. 2309 (1994), where the Court held that in order for a government exaction of property to stand, the government must demonstrate that the exaction imposed as a condition to development is roughly proportional to the impact of that development.

[11] 505 U.S. 1003, 112 S.Ct. 2886 (1992).

[12] This principle stems from a long line of Supreme Court opinions, e.g., *Agins v. City of Tiburon*, 447 U.S. 255 (1980), *Nollan v. California Coastal Commn.* 483 U.S. 825 (1987), *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470 (1987), *Hodel v. Virginia Surface Mining and Reclamation Assn., Inc.*, 452 U.S. 264 (1981), *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978), *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981) (dissenting opinion).

a property owner without an economically beneficial or productive use of his or her land are automatically considered a taking and require the payment of just compensation without inquiry into the government's intent.[13]

The Pennsylvania courts, struggling to escape the confines of *Lucas*, reasoned that Mr. Lucas was subjected to a regulation that prohibited all development, while in the Petitioners' case, the government action denied only the specific project. *Lucas* itself refutes this premise since Mr. Lucas was also denied the ability to proceed with a specific project, *i.e.*, the construction of two homes. Both the Petitioners' permit denial and the South Carolina statute produced the same result: a denial of all economically viable use. Hence, a categorical taking occurred in both instances.

In any event, this is a distinction without a difference. Whether the government action complained of is a permit denial or a blanket regulation prohibiting all use is immaterial. The correct focus for the reviewing court is on the effect the government action has on the landowner. In Mr. Lucas' case, the state of South Carolina enacted a statute that barred him from building homes on two lots that he purchased two years before the enactment. As a result, he was denied all economically viable use of his property. In the Petitioners' case, the DER denied their application for a permit to fill less than one acre of wetlands in order to build an automobile repair shop. This permit denial left the Petitioners in the same situation as Mr. Lucas — with a tract of land that is essentially valueless.

The question of whether a governmental action or regulation results in a taking of private property must be analyzed in terms of the impact of the action on the property owner's reasonable investment-backed expectations. These expectations are based on state law of property and nuisance.

> Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we

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[13] *Lucas*, 505 U.S. 1003, 1015, 112 S.Ct. 2886, 2893.

> think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with. This accords with our takings' jurisprudence, which has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the 'bundle of rights' that they acquire when they obtain title to property.[14]

In the present case, the Petitioners' reasonable investment-backed expectations are clear. They first purchased the property in 1963 as a long-term investment. The land was zoned commercially and in a rapidly developing area. The Petitioners had every reason to believe they could build a project, such as the automobile repair facility that is the subject of this case, at the time of purchase. Indeed, absent the wetlands, current and prior zoning allows for the Petitioners' intended use of their property.

In a factually similar case, *Lucas* was recently applied by the Federal Circuit Court of Appeals. In *Loveladies Harbor, Inc. v. United States*,[15] the Court upheld an award of compensation to a property owner who was denied a wetlands permit by the Army Corps of Engineers. Like the Petitioners, Loveladies Harbor suffered a loss of all economically beneficial use as a result of that permit denial. The Federal Circuit found that a regulatory taking had occurred and ordered the payment of Just Compensation.[16]

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[14] *Lucas*, 505 U.S. at 1027, 112 S.Ct. at 2899.

[15] 28 F.3d 1171 (Fed. Cir. 1994).

[16] The *Lucas* principles were also acknowledged and adopted as a threshold inquiry for regulatory takings cases by the Washington Court of Appeals in *Powers v. Skagit County*, 67 Wash.App. 180, 835 P.2d 230 (1992): *Lucas* mandates compensation for a taking whenever land use restrictions deny a landowner of all economically viable use of his property, unless the restriction is one that background principles of [the] State's law of property and nuisance already place upon ownership. *Id.*, 67 Wash.App. 180, 190, 835 P.2d 236.

Based upon the facts of this case, the Pennsylvania courts should have reached the same conclusion as the Federal Circuit. As this Court warned,

> Regulations that leave the owner of land without economically beneficial or productive options for its use . . . by requiring land to be left substantially in its natural state . . . carry with them a heightened risk that private property is being pressed into some form of public service.[17]

It is clear that the DER's denial of the Petitioners' permit application forces the Petitioners to bear a burden to protect the state's natural resources, which burden should be borne by the public. Such a burden should not be placed on property owners who are unfortunate enough to find that the state has declared their land a natural resource requiring protection. If the state feels that the property is so important to keep in its natural state, it should compensate the Petitioners for their loss. The takings clause of the Fifth Amendment "is designed to bar the government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[18]

As the Court of Federal Claims recently stated, "[w]hat emerges from the case law at a constitutional minimum is that under the guise of regulation government cannot take from a property owner the core value of the property, leaving the owner with only a hollow deed."[19]

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[17] *Lucas*, 505 U.S. at 1018, 112 S.Ct. at 2894.

[18] *Armstrong v. United States*, 364 U.S. 40 (1960).

[19] *Bowles v. U.S.*, Fed.Cl. 37, 45 (1994) citing *Hendler v. U.S.*, 952 F.2d 1364, 1373 (Fed. Cir. 1991).

CONCLUSION

For all of the reasons stated above and in the Petition for Certiorari, the NAHB respectfully urges this Court to issue a writ of certiorari to review the judgment and opinions of the Supreme Court and Commonwealth Court of Pennsylvania.

Respectfully submitted,

MARY V. DICRESCENZO
Counsel of Record
National Association of Home Builders
1201 15th Street, N.W.
Washington, DC 20005
(202) 822-0291

Dated: April 22, 1996